IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR and
S. J. UNGAR REALTY AFFILIATES, INC.,
Petitioners,

v.

HON. JAMES J. LEFF,
Justice of the Supreme Court,
New York County,
Respondent.

SIDNEY J. UNGAR,
Petitioner,

v.

NAHIM ISAIAS and
WATER FRONT SERVICE STATIONS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND APPENDIX.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND APPENDIX.

Petitioner[1] prays that a writ of certiorari issue to review two judgments of the Appellate Division, First Department,

[1] For simplification of presentation "petitioner" shall be used to refer to either of the two petitioners or both. The individual petitioner is the president and sole stockholder of the corporate petitioner.

of the Supreme Court of the State of New York, in separate but related cases. In one case the Appellate Division by order dated September 21, 1971, dismissed a petition for an order of prohibition directed to a Justice of the Supreme Court, New York County. In the other, the Appellate Division by order dated January 25, 1972, dismissed an appeal from an order denying a motion to vacate a permanent injunction.

OPINIONS BELOW

The Appellate Division wrote no opinions.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The order of the Appellate Division in the prohibition proceeding was entered on September 21, 1971. On October 20, 1971, the Court of Appeals of the State of New York dismissed petitioner's appeal taken as of right and on January 5, 1972, denied petitioner's motion for leave to appeal. The order of the Appellate Division in the injunction action was entered on January 25, 1972.

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment is violated by

1. the adjudication of important property rights of a party toward whom the judge has manifested bias and hostility;

2. the determination, without a hearing and without permitting the introduction of evidence, that the parties had not entered into a contract of settlement with respect to pending litigation;

3. the rendition of a punitive judgment, inconsistent with his findings, because of a party's refusal to accede to a judge's proposal for compromising the amount in dispute in a foreclosure action.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *.

STATEMENT OF THE CASE

The present litigation arises out of proceedings initiated by respondent Isaias in 1968 to foreclose a junior mortgage on three contiguous parcels of real property in New York City in which petitioner has the principal interest as senior mortgagee and owner of the fee. As senior mortgagees in possession petitioner and others were managing the real property. In April of 1970 they entered into a lease of the property for operation as a parking lot following demolition of three buildings on the property and commenced demolition in November of 1970. Thereupon respondent Isaias commenced an independent action against petitioner and others to restrain the demolition and a permanent injunction was granted on February 19, 1971. Meanwhile, respondent Isaias obtained the appointment of a receiver in his foreclosure action which had the effect of ousting the senior mortgagees from possession.

The Isaias foreclosure action came on for a trial before Justice Fine who directed judgment for the junior mortgagee and referred the case to a referee for a determination of the amount owing. Before the issues raised in the respective foreclosure actions were finally resolved, settlement negotiations were conducted with the aid of Justice Fine which petitioner and Justice Fine understood resulted in a stipulation of settlement on April 28, 1971, under which all controversy would be terminated, the injunction and receivership would be vacated, and petitioner would pay respondent Isaias $240,000.00 in exchange for an assignment of his mortgage. Subsequently, after the attorneys for respondent Isaias refused to effectuate the settlement, claiming no agreement had been reached, Justice Fine on May 6, 1971, after hearing, ruled that the

case had been settled by stipulation of the parties before him on April 28, 1971, and on May 24, 1971, entered an order confirming the settlement and directing respondent Isaias and his attorneys to comply with its terms.

On appeal, on July 1, 1971, the Appellate Division reversed the order of Justice Fine, holding that the record was insufficient to permit it to determine whether a settlement had been reached and stating:

> "The court decided on what he himself heard and saw. We are not shown what these facts were, only the judge's conclusions from them. The order must therefore be reversed, but without prejudice to such further application as either party may be advised to make. It would further appear that in any such application the judge's testimony as to what took place could be very material and that the matter should be heard by another court. Even if no application based on the claimed settlement should be made and the matter proceeded in its regular course, it would be inadvisable to have it concluded by the same judge."

Thereafter, on July 12, 1971, Justice Fine referred to Justice Leff the foreclosure action and related matters. At that time there were pending, among other matters, motions to vacate the injunction and to terminate the receivership for the reasons, among others, that (1) tremendous losses were being sustained as a result of the continuation of the receivership and injunction because the buildings involved were vacant and unrentable, revenues of $3,500 to $5,000 a month from the parking lot lease were being lost, and the costs of demolition were rising, (2) the injunction and receivership were being employed as a "holdup" tactic against petitioner, and (3) they did not serve to protect the interest of the junior mortgagee because the value of the property would be enhanced by demolition of the buildings and the payment in full of the junior mortgagee was secured by both the value of the security after demolition and a proffered bond for any judgment that might be obtained. The motion to

vacate the injunction offered to post a bond in the amount of $240,000.00, or such other sum as the Court might fix, to secure the interests of the junior mortgagee.

After the matter had been referred to Justice Leff, there were informal communications with his office to establish procedures for determining the question of whether the parties had agreed to a settlement before Justice Fine. On July 27, 1971, Justice Leff's secretary made four telephone calls to petitioner. In the first conversation, petitioner was advised that Justice Leff proposed that he pay to Isaias forthwith the sum of $220,000.00 and indicate the amount petitioner claimed would still be due on the mortgage, that the court would then fix the amount of a bond to be filed as security for such additional amount. The injunction and receivership would then be vacated and a hearing would be conducted in September to determine the additional amount due. Petitioner rejected this proposal as identical with one previously made by Isaias' attorney and advised that he was prepared to proceed to trial on the issue of settlement.

In the second conversation, petitioner was advised that Justice Leff had read all the papers in the case and had determined that there was no settlement, that the court would enter an order on the following day so holding and setting the case down for a hearing as to the amount due. In the third conversation, petitioner was advised that if he desired a hearing on the issue of settlement, it would be held late in September but meanwhile the losses resulting from the receivership and injunction would continue. Petitioner then advised that he was prepared to post a bond in the full amount that Isaias could possibly recover. In the fourth conversation, petitioner was advised that the Justice had rejected his counter proposal and suggested that petitioner reconsider his earlier proposal which petitioner declined to do. Petitioner then requested oral argument on the pending motions, which did not involve the issue of settlement and was advised that it would not be granted.

A reply affidavit relating to the motion to vacate the receivership and injunction, filed July 27, 1971, set forth, among other things, that the continuation of the receivership and the injunction deprived petitioner of the rental provided for in the parking lot lease, that petitioner suffered damages of $50,000.00 as a result of Isaias' refusal to effectuate the claimed settlement agreement and that petitioner was prepared to post a bond in any amount fixed by the court. He requested the court to prescribe the procedure for determination of the settlement issue and proof of damages for failure to consummate the settlement.

On July 28, 1971, Justice Leff, in a conversation with the attorney for one of the interests affiliated with petitioner, made the following statements:

> "Ungar always misrepresents and does not tell the truth. Ungar is a son of a bitch and has gone as far as he will go in this matter. Ungar is trying to get cheap money and he is delaying the matter deliberately. I do not believe Ungar is suffering any damage. I will not see Mr. Ungar and he cannot be in my presence. The only way Ungar can get possession and vacate the receivership is to pay $220,000 and put up a bond for the balance. I have read the Appellate Division decision and it does not say that there must be a hearing before a determination can be made as to whether there was any settlement. I am going to deny the motions at the end of the week and instruct the plaintiff to go ahead with the foreclosure proceedings."

On the same day Justice Leff signed an order which denied the pending motions and on the following day, July 29, 1971, signed a memorandum opinion, filed July 30, 1971, in which he held, notwithstanding the fact that the issue had not been presented for determination and that he had held no hearing and received no evidence, that there had been no valid settlement terminating the actions. The memorandum opinion further stated that

he had "articulated what I deem to be the posture of the case as it is now before me. I am doing this by way of a written decision because the insidious character of the representations made by Sidney J. Ungar, a disbarred lawyer appearing pro se,[2] are such that I do not deem it prudent to communicate informally or by conference with the parties litigant."

The memorandum opinion continued:

> "Briefly, the only issue in what should be a simple mortgage foreclosure, is how much is owed Nahim Isaias on a past-due second mortgage. The interests associated with Sidney J. Ungar are the owners of the senior mortgages and of the underlying fee. It appears unquestioned, at this time that: (1) the action need not go to a foreclosure sale; (2) that the value of the property is such that Nahim Isaias can, in all likelihood be paid in full; (3) that a receivership should not be necessary to assure the ultimate payment of Isaias' claim; and (4) that the injunction against demolition could be vacated without prejudice to the payment of Isaias' claim. None of this is now possible by reasonable and expeditious means because of the posture of Ungar."

The memorandum opinion further held that "the receiver is to continue in possession and the injunction to remain in force."

On August 12, 1971, petitioner filed in the Appellate Division a petition for an order of prohibition, among other things, enjoining Justice Leff from conducting any further proceedings in the foreclosure action and in all other related pending matters on the ground that his

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[2] In 1968 petitioner had been ordered to show cause by the United States District Court for the Southern District of New York why he should not be removed from its rolls as an attorney on the same charges that resulted in his disbarment by the Appellate Division. He answered each charge by a lengthy affidavit. No further proceedings were taken in the federal court and he remains a member in good standing of the bar of that court.

bias and prejudice to petitioner will prevent him from rendering an impartial judgment therein and directing that all pending matters be conducted by another Justice. The petition alleged among other things that Justice Leff's findings demonstrated "that he was so biased and prejudiced against Ungar that he was incapable of judging the case with the impartiality that the law requires of a Justice of the Supreme Court" and that the justice's findings with respect to the necessity of continuing the receivership and the injunction and his continuation of the receivership and injunction notwithstanding these findings demonstrated that his "direction constituted a retributive reprisal against Ungar for having rejected the proposal of Justice Leff."

In an amendment to the petition filed on August 18, 1971, petitioner alleged that the decision of Justice Leff, dated July 29, 1971, and his judicial conduct described in the petition "denied to the petitioners their constitutional right to an adjudication in conformity with due process of law, and their constitutional right to equal protection of the laws, as guaranteed to them in the Constitution of the United States and in the Constitution of this State."

On September 21, 1971, the Appellate Division dismissed the petition for an order of prohibition. On September 23, 1971, petitioner filed a notice of appeal as of right in the Court of Appeals. On October 20, 1971, the Court of Appeals dismissed the appeal upon the ground that it does not lie as of right. On November 15, 1971, petitioner filed a motion for leave to appeal to the Court of Appeals which the Court of Appeals denied on January 5, 1972.

In his affidavit in support of the motion for leave to appeal, petitioner also recited that the supplement to his petition for an order of prohibition which was denied by the Appellate Division had "raised the issue that the judicial conduct of Justice Leff had denied petitioners their

constitutional right to an adjudication in conformity with due process of law and also their constitutional right to equal protection of the laws." His supporting brief stated that "The moving affidavit contends that the conduct of Justice Leff produced a miscarriage of justice and a denial of the petitioner's constitutional rights to a fair trial in conformity with due process and equal protection of the law."

The specific acts of judicial misconduct alleged to constitute a denial of the constitutional right to a fair trial in conformity with due process were (1) the determination of the controlling issue of whether there had been an agreed settlement without affording petitioner the right to a hearing, (2) the continuation of the injunction and receivership, despite a finding that there was no need for such restraints, as an act of retributive vengence because petitioner refused to abandon the original settlement and to accept Justice Leff's proposal to pay $220,000 forthwith and have the court then determine the amount still due on the mortgage, and (3) Justice Leff's manifest bias and prejudice which rendered him incapable of making an impartial judicial determination of the issues.

In the appeal to the Appellate Division from Justice Leff's order of July 28, 1971, which denied the motion dated July 9, 1971, to vacate the injunction, petitioner's brief requested the court to consider "whether or not the actions and conduct of Justice Leff were such as to deprive the appellants of due process of law and equal protection of law as guaranteed by the State and Federal Constitutions, based on his clearly stated prejudice and hostility to the appellant herein" and petitioner's constitutional "rights to a hearing on the issues of whether a settlement had been agreed on by the parties in the foreclosure action." On January 25, 1972, the Appellate Division dismissed the appeal relating to Justice Leff's order denying vacation of the judgment of injunction.

REASONS FOR GRANTING THE WRIT

The decisions of the court below (1) in refusing in the prohibition proceeding to disqualify the trial judge who by his own statements and his conduct manifested a strong bias and hostility toward petitioner and (2) in dismissing in the injunction proceeding the appeal from an order based upon the determination without a hearing or opportunity to present evidence on the controlling issue whether a settlement had been agreed upon, deprived petitioner of a fair trial and constituted a denial of the basic standards of due process of the Fourteenth Amendment contrary to decisions of this Court.

1. Before deciding the several motions pending before him, Justice Leff stated to an attorney in the litigation, although petitioner had not appeared before the judge or made any representations to him, that "Ungar always misrepresents and does not tell the truth. Ungar is a son of a bitch and has gone as far as he will go in this matter." In a memorandum opinion signed the following day explaining his disposition of the pending motions, he referred to "the insidious character of the representations made by Sidney J. Ungar, a disbarred lawyer appearing pro se." The opinion continued "(3) that a receivership should not be necessary to assure the ultimate payment of Isaias' claims; and (4) that the injunction against demolition could be vacated without prejudice to the payment of Isaias' claim" but held, nevertheless, that "the receiver is to continue in possession and the injunction to remain in force." The expenses of the receivership exceeded its income and the injunction deprived petitioner of substantial parking lot revenue, thus resulting in significant losses to petitioner. Their continuation, notwithstanding the judge's finding that they were not necessary to secure the payment in full of the junior mortgage and petitioner's offer to post a bond in any amount fixed by the court to secure such payment in full, can only be viewed as a punitive act flowing from manifest hostility to petitioner.

The adjudication of issues in litigation by a judge who has manifested such bias and hostility offends "the due process requirement of an impartial tribunal." *In re Murchison*, 349 U.S. 133, 134 (1955). "A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison, supra*, at 136. Whether the bias results from interest or hostility, disqualification is required. In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court held disqualification to be warranted because "no matter what the evidence was against him, he had the right to have an impartial judge." And in *Offutt v. United States*, 348 U.S. 11 (1954), this Court held that indications of hostility by the trial judge demonstrated a bias and lack of impartiality which required that the matter be tried before another judge. Similarly, in *Cooke v. United States*, 267 U.S. 517, 539 (1925), the Court held that the matter should be heard before another judge because "the case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion."

Judge Leff's lurid and unflattering characterization of petitioner and his vindictive infliction of substantial monetary losses by a determination to continue an injunction which the judge himself acknowledged to be unnecessary clearly demonstrate the bias and lack of impartiality which required the judge's disqualification to comport with the Fourteenth Amendment's due process requirements. The Appellate Division's failure to enjoin Justice Leff's participation in the litigation by dismissal of the petition for an order of prohibition denied petitioner due process.

2. The determination, without hearing, without argument, and without permitting any evidence to be offered, that there had been no settlement agreement also constituted a denial of due process. The issue of settlement

was pivotal to the entire litigation. Justice Fine had ruled that there had been a settlement agreement and that its consummation would dispose of all issues in the litigation including, obviously, the receivership and injunction. In holding that the record of proceedings before Judge Fine was insufficient to permit it to determine whether a settlement had been reached, the Appellate Division stated "the order must therefore be reversed, but without prejudice to such further application as either party may be advised to make. It would further appear that in any such application the judge's testimony as to what took place could be very material and that the matter should be heard by another court."

It is clear from the Appellate Division's opinion that there was to be a redetermination of the question of settlement on which "the judge's testimony as to what took place could be very material." Judge Leff, however, refused requests to establish a procedure for determining the settlement issue and, without a hearing and without receiving "the judge's testimony as to what took place" or any other testimony, decided on the record which the Appellate Division had held insufficient for such determination that there had been no settlement.

The Appellate Division acknowledged, in reversing Justice Fine's order, that the settlement "would terminate the action and no further proceedings could be had in it." Justice Leff, therefore, could not "consistently with due process" decide that pivotal question without a hearing. *Bell v Burson*, 402 U.S. 535, 541 (1971). The pronouncements of this Court that a prior hearing is an indispensable prerequisite to a decision affecting important property rights are legion. In *Sniaduch v. Family Finance Corp.*, 395 U.S. 337, 342 (1969), the Court announced that "it needs no extended argument to conclude that absent notice and a prior hearing * * * this prejudgment garnishment procedure violates the fundamentals of due process." "In every setting where important decisions turn on questions

of fact, due process requires an opportunity to confront and cross examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Accordingly, the Court went on, denial to a recipient of public assistance of the right to present evidence or to confront or cross-examine adverse witnesses before the termination of public assistance payments was "fatal to the constitutional adequacy of the procedures." 397 U.S. at 268. An adjudication of property rights "must be preceded by notice and opportunity for a hearing" which "must measure up to the standard of due process." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). This right to a fair hearing has been characterized as "one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *R.R. Comm'n v. Pacific Gas Co.*, 302 U.S. 388, 393 (1938).

Since a judgment entered without a hearing is void for want of due process of law (*Hovey v. Elliott*, 167 U.S. 409 (1897)), Justice Leff's determination without hearing that there had been no settlement agreement is invalid with the result that his direction that the injunction against demolition continue, which depended on this finding, is similarly invalid. The Appellate Division's dismissal of the appeal from this decision was, therefore, a denial of due process.

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

ORDER OF COURT OF APPEALS, January 5, 1972

Mo. No. 981

IN THE MATTER OF THE
APPLICATION OF SIDNEY
J. UNGAR and S. J. UNGAR
REALTY AFFILIATES, INC.,
Appellants,

For an Order &c. directed to

HON. JAMES J. LEFF, JUSTICE
OF THE SUPREME COURT,
NEW YORK COUNTY,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

/s/ Gearon Kimball
Deputy Clerk

[SEAL]
A copy

ORDER OF COURT OF APPEALS
October 20, 1971

Mo. No. 860B

IN THE MATTER OF THE
APPLICATION OF SIDNEY
J. UNGAR & ANO.,
Appellants,

For an Order &c. directed to

HON. JAMES J. LEFF, JUSTICE
OF THE SUPREME COURT,
NEW YORK COUNTY,
Respondent.

A cross-motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said cross-motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground it does not lie as of right.

/s/ Gearon Kimball
Deputy Clerk

[SEAL]
A copy

ORDER OF APPELLATE DIVISION
September 21, 1971

3990
[M-7426]

IN THE MATTER OF THE
APPLICATION OF SIDNEY
J. UNGAR and S. J. UNGAR
REALTY AFFILIATES, INC.,
Petitioners,

For an Order Pursuant to Article 78 C.P.L.R.
Directed to

HON. JAMES J. LEFF, JUSTICE
OF THE SUPREME COURT,
NEW YORK COUNTY,
Respondent.

The above-named petitioners having presented a petition, verified August 12, 1971, to this Court, praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and Rules, (1) vacating a direction of respondent ordering a reference before an official referee to determine the amount due in a foreclosure action and staying any action by said referee therein; (2) directing respondent to conduct hearings pursuant to an order of this Court to determine whether a settlement had been entered into between the parties; (3) enjoining respondent from conducting any further proceedings on the grounds of bias and prejudice; and (4) directing that any additional proceedings be had before another justice;

Now, upon reading and filing the notice of application, dated August 12, 1971, with proof of due service thereof, the petition of the above-named petitioners, verified August

12, 1971, and the exhibits annexed thereto, the affidavit of Sidney J. Ungar and the memorandum of Irving L. Weinberger, all read in support of the petition, and the memorandum of Hon. Louis J. Lefkowitz, Attorney General, in opposition thereto, and after hearing Mr. Irving L. Weinberger for the petition, and Hon. Louis J. Lefkowitz opposed, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs and without disbursements.

ORDER OF APPELLATE DIVISION
January 25, 1972

4705-08N—Appeal from order, Supreme Court, New York County (Fine, J.), entered July 13, 1971, and orders, Supreme Court, New York County (Leff, J.), entered July 20, 1971, (a) denying cross-motion to vacate receivership and (b) denying vacation of receivership and judgment of injunction, unanimously dismissed as non-appealable, moot and academic, without costs and without disbursements. Order, Supreme Court, New York County (Leff, J.), entered July 30, 1971, denying motion to direct receiver to maintain status quo, unanimously affirmed. Respondent Isaias shall recover of appellants $30 costs and disbursements of this appeal. These protracted proceedings would best be terminated and the interest of the parties better served by the forthwith completion of the matter at Trial Term rather than by continued appeals.